April 16, 2009

Mr. Corbin Davis
Clerk
Michigan Supreme Court

Re: ADM File No. 2009-04.

Dear Clerk Davis:

Below are my comments with respective to Administrative File 2009-04, the alternative proposals regarding judicial disqualification.

The Nature of the "Problem"

Before any sea change with regard to the recusal process involving Supreme Court justices is undertaken, it would seem appropriate to determine if there is any problem that needs fixing, and if so, to determine its precise nature, so that any "remedy" fits the problem. As I see it, three central issues are raised: 1)what standards govern justices with regard to recusal (e.g. does MCR 2.003 apply?)? 2)should justices individually determine the question of recusal, or should a justice's decision be subject to review, either by the Chief Justice or the "unchallenged" justices? 3) should justices record their reasons for recusing or declining to recuse? It seems to me that currently the answer to the standards question is somewhat unclear, while as to points 2) and 3) it has been the practice throughout the history of the State that the individual justices are the final arbiters of the recusal question, and need not state reasons when recusing or declining to recuse (though nothing prevents them from doing so). I believe that some rule amendment to clarify the standards question is appropriate, that changing the historical practice that each justice makes his or own decision on recusal would be a huge mistake (and is arguably outside the authority of the court), and that there is no need to alter the practice with regard to statement of reasons. One must ask, why are we considering these questions at all?

The current practice has been the practice throughout the State's history. It is the practice of the United States Supreme Court. I do not understand what there is about the current time that requires a change—why is that which has served so long with almost no controversy now a matter of concern? I believe that the "controversy," such as it is, has largely been ginned up for the purposes of gaining a tactical advantage (and is instructive as to the sorts of machinations and

manipulations that can be expected if the current procedures are changed to allow justices to determine the participation in cases of their fellow justices). And it is also the result of sensibilities that have gotten, in my opinion, overly tender.

A brief look at history:

- Chief Justice John Marshall authored *Marbury v Madison*. That litigation arose when Secretary of State John Marshall left Marbury's commission in his desk when he left the Adams administration. Marshall did not recuse.

- Chief Justice Chase devised the Greenback Legislation as Secretary of the Treasury, and was on the Court when it considered the Legal Tender Cases. He did not recuse.

- Justice Oliver Wendell Holmes was on the Supreme Court when it considered decisions of the Massachusetts Supreme Court rendered when he sat on that court. He did not recuse (see e.g. Worcester v. Worcester Consolidated Street R. Co., 196 U.S. 539, 25 S.Ct. 327, 49 L.Ed. 591 (1905), Dunbar v. Dunbar, 190 U.S. 340, 23 S.Ct. 757, 47 L.Ed. 1084 (1903); Glidden v. Harrington, 189 U.S. 255, 23 S.Ct. 574, 47 L.Ed. 798 (1903)).

- Senator Black wrote the Fair Labor Standards Act and guided it through Congress. He was on the Court when its constitutionality was considered. He did not recuse (*United States v. Darby,* 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941).

And there are other similar examples involving Justice Jackson, among others.

Were all of these justices (and their colleagues, who did not raise the matter), ethically challenged? As the Seventh Circuit has observed, "While the practices of Supreme Court justices regarding disqualification may not be dispositive, they are persuasive." Moreover, "it would be presumptuous for us to hold that some of the most distinguished jurists" were oblivious to their duty as jurists in these circumstances. See *Del Vecchio v. Illinois Dept. of Corrections,* 31 F.3d 1363, 1377 (C.A.7, 1994).

The quest for the perfect may be the enemy of the good. Particularly when considering members of courts of last resort, a refusal to credit jurists with the ability to follow their oath and recuse when appropriate is unseemly to the administration of justice.

With these prefatory remarks, I turn to the proposals put forth by the Court.

Proposal A Is The Preferred (Slightly "Tweaked")

A. The "Duty to Sit"

It has been suggested on occasion that the notion of a "duty to sit" on the part of a judge or justice is a "federal doctrine" that some wish to "impose" or "import" into Michigan. But it is not. It is a common-law rule extending back centuries. And it has also been said that when the federal recusal statute was amended to require recusal when a judge's impartiality "might reasonably be questioned," 28 USC § 455, the "duty to sit" principle was abrogated in the federal courts. This is a mistaken assessment. The "duty to sit" is simply to duty of a judicial officer to sit *unless disqualified* by the *applicable* rules concerning disqualification. Section 455 changed the federal rule on disqualification, but if, under the rule as it now exists, a judge or justice is *not* disqualified, that judge or justice surely has a duty to sit. Why would any responsible system want it otherwise—to permit judges who are not disqualified by the rules concerning recusal to simply opt out of cases they deem too distasteful, complex, difficult, or time-consuming, passing them on to a colleague (or, in the case of a justice, leaving the court short one, and subject to an unnecessary "tie" vote)? That a judge or justice has the duty to sit unless disqualified ought to be a bedrock rule of conduct for judges and justices; the question is, what should the rules of disqualification be?

—The Duty to Sit Is A Common-Law Rule

The principle that a judge or justice has the duty to sit on a case unless he or she is disqualified by the applicable rules concerning recusal is one with an ancient historical pedigree—what has changed are the principles concerning disqualification, which have broadened. At common law, judges were disqualified only for a personal interest in the case—relationships that are disqualifying today, or even knowledge of the facts of the case, were not disqualifying. Those who argue that a justice should not make the final decision on his or her own disqualification because one "should not be the judge of his own case" profoundly misunderstand history. The *case* is the underlying controversy—absent an actual interest in the outcome of the *case*, historically even actual bias was not disqualifying for a judge.

> The common law of disqualification, unlike the civil law, was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else. Although Bracton tried unsuccessfully to incorporate into English law the view that mere "suspicion" by a party was a basis for disqualification, it was Coke who, with reference to cases in which the judge's pocketbook was involved, set the standards for his time in his injunction that "no man shall be a judge in his own case." Blackstone rejected absolutely the possibility that a judge might be disqualified for bias as distinguished from interest.

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> ...English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges disqualified for financial interest. No other disqualifications were permitted, and bias, today the most controversial ground for disqualification, was rejected entirely.
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> John P. Frank, "Disqualification of Judges," 56 Yale L.J. 605, 609 -610 (1947)

If not disqualified, judges had a duty to sit. Judith Resnick, "Managerial Judges," 96 Harv. L. Rev. 374, 448 (1982).

—The Duty To Sit Continues and Ought Always to Continue

When Congress passed § 455, House Report 93-1453 1974 U.S.C.C.A.N. 6351, 6354 -6355 (1974) observed that the statute set up an "objective standard." That report also indicated that the new language had "the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute." The Report described the "duty to sit" as "urging" that "a judge, faced with a close question on disqualification, . . . resolve the issue in favor of a 'duty to sit.'" Without digressing concerning the limited uses of legislative history, suffice it to say that the Report misdescribes both the duty to sit and the effect of the statute. The case cited for the principle that the duty to sit is one urging a judge to resolve "close questions" on disqualification in favor of sitting, *United States v Edwards*, 334 F.2d 360 (CA 5, 1964), says no such thing. Rather, it says that "It is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusation." I must say again, what responsible system ought *not* follow this principle? The statute changed the basis for disqualification, but it did not change the principle that a judge who is not disqualified must hear the case, which is the actual duty to sit. And though some courts have picked up on the Report's misdescription, others have recognized that judges must sit unless disqualified under whatever the applicable standard is.

Several cases demonstrate the point. Recusal in the federal system now is required "when a judge's 'impartiality might reasonably be questioned'" but "judges should not 'recuse themselves lightly. . . .'" *United States v. Cruzado-Laureano*, 527 F.3d 231, 239 (CA 1, 2008). In other words, the generally understood and followed proposition is that "in the absence of a legitimate reason to recuse himself, 'a judge should participate in cases assigned.'" Were it otherwise, judges "could recuse [themselves] for any reason or no reason at all; [they] could pick and choose [their] cases, abandoning those that [they] find difficult, distasteful, inconvenient or just plain boring." *United States v. Holland*, 519 F.3d 909, 912 (CA 9, 2008).

In sum, the duty to sit is not a "creation" of the federal system. It states what should be an unremarkable principle that a judge who is not disqualified under whatever the rules of disqualification may be may not take him or herself off the case, but on the other hand, if the rules

require disqualification, the judge must recuse.[1] One returns to the question, what should the rules of disqualification be, understanding that if in a given case disqualification is not required by the rules a judge has a duty to sit? And what procedures should be followed in the case of justices of the Michigan Supreme Court?

B. The Content of the Rule

—The Current Rule

MCR 2.003 on "Disqualification of Judge" provides:

> (B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:
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> (1) The judge is personally biased or prejudiced for or against a party or attorney.
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> (2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
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> (3) The judge has been consulted or employed as an attorney in the matter in controversy.
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> (4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.
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> (5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.
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> (6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
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> (a) is a party to the proceeding, or an officer, director or trustee of a party;
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> (b) is acting as a lawyer in the proceeding;
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> (c) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
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> (d) is to the judge's knowledge likely to be a material witness in the proceeding.

[1] This has nothing to do with the "rule of necessity." Under that rule even judges or justices disqualified by the prevailing rules sit because it is necessary to decide the case, as when judges rule on judicial pay issues. See e.g. *United States v. Will,* 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980).

A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

I believe that construing the MCR 2.003(B) as providing for disqualification only on a showing of actual bias is contra-textual. Personal bias or prejudice for or against a party is only *one* listed ground for recusal, and not the *only* ground, as though subparagraphs (2) through (6) are subsections of (1) providing examples of actual bias. The other listed grounds do not *prove* personal bias or prejudice for or against a party; rather, the rule simply identifies circumstances where, *without regard to personal bias for or against a party*, the rule presumes that the judge cannot impartially hear the case simply because of the circumstances, whether that is true in actual fact or not. Only the first ground for disqualification is based on actual bias. An appearance of partiality of sufficient magnitude as to cause recusal is the rationale for all other grounds ((B)(2) through (6)). In fact, the Court itself has described the rule as setting forth "a list of situations *that are deemed to be the equivalent* of an inability to hear a case impartially." *Cain v Michigan Department of Corrections*, 451 Mich 470, 494-495 (1996) (emphasis supplied). For example, whether actually biased for or against a party, a judge who is related to the third degree of relationship (or whose spouse is) to someone likely to become a material witness in the case cannot sit because the *appearance* of partiality in such a circumstance is so great as to justifiably cause a lack of confidence by a litigant (or the public, in appropriate cases) in the impartiality of the forum.

The current rule, then, disqualifies when actual bias is shown, and it disqualifies in specified situations where the appearance of possible partiality is sufficiently great as to cause a lack of confidence by a litigant in the impartiality of the forum, *and* the rule is not limited to these named situations ("including but not limited to"). The named circumstances supply examples of the sort of circumstances where disqualification should result even without a showing of actual bias, and any equivalent circumstances should be of like kind. I would thus add to the rule language to help identify the circumstances *not* specified by the rule (again, the rule "including but not limited to" the specified circumstances); namely, "(7)other like circumstances where an objective person would have a substantial doubt as to the impartiality of the forum."

I suggest, then, adding my proposed (7) to current MCR 2.003. Because, unless disqualified, judges have a duty to sit, as described above, I would also favor adding language at the beginning of the rule to provide "(B) Grounds. *Unless disqualified under the provisions of this rule, a judge has a duty to serve in every case.* A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which...." (additional language in italics).

—A New Rule for Justices

With the addition of a subsection (7) that would conform with what I have suggested for current MCR 2.003(B)("(7)other like circumstances where an objective person would have a substantial doubt as to the impartiality of the justice"), I think Alternative A the far better proposal, as I believe recusal of Supreme Court justices raises different procedural issues than with lower courts. As I read the proposal, the grounds are the same for justices under Proposal A as for judges under MCR 2.003(B) (and again, I'd add my proposed (7)). The critical advantage that A has over the other alternatives is that it leaves the decision where it ought to be—with the individual justice.

I will not wade into the argument over whether the Supreme Court has authority to appoint "temporary justices" to replace disqualified justices, saying only that it is my view that as a matter of text, history, and structure of our Constitution this is not permissible, and as a matter of sound policy the replacement of a justice with someone not a member of the Court should never be allowed to happen. But none of the proposals would add a temporary justice in the event of a recusal. When a recusal occurs, then, the court would be (as it always has in its entire history) short of its full complement, and subject to a "tie" vote, resolving nothing. This counsels observance of the duty to sit and vigilance on the part of the Justices in reviewing motions requesting their recusal. As Justice Scalia put it regarding the suggestion that he should "resolve any doubts in favor of recusal":

> That might be sound advice if I were sitting on a Court of Appeals. But see *In re Aguinda*, 241 F.3d 194, 201 (C.A.2 2001). There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case. . . . Moreover, granting the motion is (insofar as the outcome of the particular case is concerned) *effectively the same as casting a vote against the petitioner*. The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all (emphasis supplied).
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> *Cheney v. U.S. Dist. Court for Dist. of Columbia,* 541 U.S. 913, 915-916, 124 S.Ct. 1391, 1394 (2004)(opinion of Justice Scalia in chambers)

Justice Holmes once said that "an ounce of history is worth a pound of logic." With regard to the procedure for recusal, both history and logic support the continued practice of each justice individually deciding questions of his or her disqualification. It has been the history of the court. It is the history of the United States Supreme Court. After all, a final decision must rest somewhere, and the notion that allowing the Chief Justice or "nonchallenged" justices to decide the disqualification of a fellow justice or justices somehow removes appearances of partiality in the decision is naive—and it is open to manipulation. Someone has to be final—why should it be

considered less palatable for the decision of the challenged justice to be unreviewable than the decision of the Chief Justice, or under one alternative, the decision of the unchallenged justices? Based on judicial philosophy discernable through prior decisions, one might conclude that the Chief Justice was likely to vote on the case in a way contrary to that of the challenged justice, and so removed that justice so as to avoid a vote for the opposite position. The same is true with a procedure involving the unchallenged justices. A party could challenge a group of justices the party believes, as a matter of judicial philosophy, likely unsympathetic to his position, remove them from the decisional process on recusal, and gain their recusal by justices sympathetic to his or her cause. And while those justices (or the Chief Justice, under the other proposal) might have acted entirely appropriately, they would be open to this charge. Moving the decision from the challenged justice to the Chief Justice or the unchallenged justices solves nothing in this regard, and, in my view, exacerbates the gamesmanship and manipulation that has occurred in recent years.

And, perhaps more fundamentally, I have grave questions as to whether even a majority of the court has the constitutional authority to oust a lawfully-seated justice from the consideration of a case.

Proposal A also does not require a justice to state reasons for recusing or denying a request to recuse (again, keeping with historical practice). I disagree that Article 6, § 6 is applicable here. That provision states that "[d]ecisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . . . " It also requires that a justice who dissents state a reason. A decision by an individual justice to recuse or not to recuse is not a "decision of the supreme court" within this provision. Moreover, even if it is, the court satisfies this provision in denying leave to appeal by stating that it is "not persuaded that the questions presented should be reviewed by this Court," satisfies it when denying interlocutory appeals by stating it is "not persuaded of th need for immediate review," and satisfies it with regard to applications from denials of motions for relief from judgment by stating that the defendant "has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." A justice could deny recusal under Article 6, § 6 by stating that "I am not persuaded that recusal is required under MCR 2.003-SC" or explain a recusal by saying "I am persuaded that recusal is required under MCR 2.003-SC."

The enactment of any new rule is likely to encourage frivolous motions, and I suspect the time of the justices of the court is better spent than writing statements of reasons for denying motions to recuse. It is noteworthy that then Justice Rehnquist was discouraged by some Justices from filing reasons why he would not recuse in *Laird v Tatum*, 409 U.S. 824, 837, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972) lest it be seen as setting a precedent, departing from the ordinary practice of a Justice recusing or declining to recuse making no comment (the ordinary practice, with rare exceptions, to this day).

I would add one other "tweak" to Alternative A. The rule states that "Unless one of the conditions specified below is met, it is the duty of a justice to serve in every case and a justice is not mandatorily required to withdraw from serving on a case." This sentence strikes me as internally slightly inconsistent. If a justice has a duty to serve unless disqualified under the rule, then the justice should *not* withdraw, and the continuation of the sentence "and a justice is not mandatorily

required to withdraw from serving on a case" seems to suggest that a judge may recuse even if the conditions are not met. This seems to me inconsistent, or at least confusing. I would simply end the sentence with a period after "it is the duty of a justice to serve in every case." Justices should not recuse for "discomfort" with a case, but only if disqualified under the rules.

Conclusion

Well over a century ago now our most renowned justice, Justice Thomas Cooley, was defeated for reelection. Among the accusations thrown at Justice Cooley in the vehement campaign against him were that he was a tool of business (complete with newspaper charts detailing the number of decisions "in favor of corporations" and those against, and the number "in favor of a railroad," and those against, proving that the more things change the more they stay the same), and that he had supported Justice Campbell in his decision not to recuse in *Maclean v Scripps*, 52 Mich 214 (1883), a libel case upholding a judgment of $20,000 against the owner of the Detroit News (Justice Campbell wrote the decision). In the opinion denying rehearing Justice Cooley wrote:

> The point is now made that one of the members of this court, who was also one of the majority in deciding the case, ought not to have participated in the decision, for the reason that his son is a member of the partnership of attorneys who were attorneys of record for the plaintiff in bringing the suit. In support of the position, a number of cases are cited in which it has been decided that a judge cannot sit in a cause in which he has a personal interest, or where he is nearly related to one of the parties. They have no relevancy to the point made, and the point itself presents no question of law. How little there is to it, in fact, will be apparent when it is stated that neither the son nor his partner ever took any part in the proceedings in this court, or ever appeared before us in the case, and that the record in this court upon which the case was decided showed very conclusively that the management of the case in the trial court had been in other hands.
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> *Maclean v. Scripps* 52 Mich. 214, 254-2551(1884)

Then, as it is now, the recusal point was raised tactically (albeit belatedly) to try to gain an advantage. Justice Campbell properly did not recuse, and would not be required to recuse (and thus would have a duty to sit) under the current rule as well as Alternative A. This is as it should be.

I urge the Court to adopt alternative A, to amend it slightly by adding my suggested subparagraph (7) and by striking language I have suggested be stricken from the initial sentence, and that *whatever* it decides it leave the recusal decision in the hands of each individual justice.

I thank the members of the court for their forbearance with this too-long comment. I would add that Justice Boyle called me to discuss the alternative proposals, and when I told her I intended to file a comment she requested an opportunity to review it. She has asked me to add that having reviewed the comments she concurs in these remarks in their entirety.

Sincerely,

Timothy A. Baughman